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In Search of Equality in Legal Education: *The Grutter v. Bollinger Case*

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Laura Lisa Sandoval

“Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”

—Justice O’Connor,¹
June 23, 2003

I. Introduction

It was the hope for many that the segregation which had permeated American society and its laws for over two hundred years would soon be eradicated; it was the aspiration of millions of minorities to be able to walk through the guarded gates of academia to receive the coveted benefits of education, careers, and social acceptance; and it was the dream of many that America would finally fulfill the promises found in the cherished documents of the Declaration of Independence, the Constitution, and the Bill of Rights. Affirmative action was expected to bring these promises to fruition. This article is a critical analysis of the latest Supreme Court decision concerning the transformation of affirmative action programs, from their conception to their current status in higher education. It begins with a short history of affirmative action and thereafter evaluates Barbara Grutter’s challenge of the constitutionality of the admissions program at the University of Michigan Law

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1. Grutter v. Bollinger, 539 U.S. 306, 332 (2003).

School. The article then deconstructs and articulates the issues within the Fourteenth Amendment, and in particular, the use of race in higher education admissions and diversity as a compelling governmental interest.

II. A Short History of Affirmative Action

The concept of affirmative action first appeared in 1961 when President Kennedy issued an Executive Order creating the Committee on Equal Employment Opportunity stating that projects financed by federal funds "take affirmative action to ensure that applicants are employed . . . without regard to their race, creed, color or national origin."² Three years later, President Johnson reinforced the concept by ensuring the passage of the Civil Rights Act of 1964, which also prohibited discrimination of all kinds based on race, color, religion or national origin.³ The following year, he articulated the *original* meaning of affirmative action in a speech at Howard University.

You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. . . . We seek not just freedom but opportunity. We seek not just legal equity but human ability, *not just equality as a right and a theory but equality as a fact and equality as a result.*⁴

That same year, President Johnson issued an Executive Order that required government contractors to "take affirmative action" towards minority employees in all aspects of hiring and employment.⁵ In 1967, the Order was amended to include

2. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961) [hereinafter Kennedy].

3. The Civil Rights Act of 1964, Pub. L. No. 88-352, 703(a)(2), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. 2000 (2000)).

4. Lyndon Baines Johnson, Commencement Address at Howard University: To Fulfill These Rights, 2 Pub. Papers 634 (June 4, 1965), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp> (last updated Feb. 18, 2002) [hereinafter Johnson] (emphasis added).

5. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), available at <http://www.dol.gov/esa/regs/statutes/ofccp/eo11246.htm> (last visited Mar. 10, 2004). The Order states that

discrimination on the basis of gender.⁶ Shortly thereafter, the Secretary of Labor, Arthur Fletcher, observed that in Philadelphia, “[t]he craft unions and the construction industry are . . . openly hostile towards letting blacks into their closed circle”⁷ causing President Richard Nixon to issue the “Philadelphia Plan,” which required federal contractors to show “affirmative action” to meet the predetermined goal of increasing minority employment.⁸

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.

Id. (emphasis added).

6. Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969), *amended by* Exec. Order No. 12,106, 44 Fed. Reg. 1,053 (1978) (providing for the adoption and implementation of equal employment opportunity), *amended by* Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (1998), and *amended by* Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (2000) (requiring nondiscrimination on the basis of sex in education programs). In pertinent part, Executive Order No. 11,478 § 1 states that:

It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, *sex*, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency.

Id. (emphasis added).

7. Borgna Brunner, *Bakke and Beyond: A History and Timeline of Affirmative Action*, available at http://www.uis.edu/multiculturalstudentaffairs/bakke_and_beyond.htm (last visited Sept. 20, 2004).

8. See Dean J. Kotlowski, *Richard Nixon and the Origins of Affirmative Action* (1998), available at http://www.findarticles.com/cf_dls/m2082/n3_v60/20649393/p7/article.jhtml?term= (last visited Apr. 7, 2004). In 1969 under the Nixon Administration, the Labor Department sought to knock down barriers to blacks seeking jobs in the booming, high-paying, and largely white construction industry by promoting voluntary minority-hiring agreements between unions and contractors. There were some impressive results but progress was slow; to accelerate the process the Department adopted the “Philadelphia Plan.” Based on a similar plan devised during the Johnson Administration but never implemented, the Philadelphia Plan set a range of percentages of minority hiring with which contractors would be required to make a “good faith” effort to comply. When ordered into effect in September 1969 in its namesake city, the plan aroused controversy and heated opposition. Congress considered but rejected legislation to ban it. In February 1970 the Department announced the plan would be extended to other cities unless they devised their own procedures for ending job discrimination in the construction industry. Developed with assistance from the Department, “hometown” solutions were adopted in many cities. Under these plans, local contractors, unions and minority organizations signed equal opportunity agreements covering private as well as federally funded construction. The Office of Federal Contract Compliance Pro-

The doors to the hallowed halls of professional educational opportunities also began to open for minorities, but the issue here was different because professional schools only had a limited number of seats for an entering class. For this reason, it was not only a matter of opening the doors for minorities in professional schools, but it was also a matter of consequently limiting the number of non-minority students. In *Regents of the University of California v. Bakke* the Supreme Court imposed a limitation on affirmative action to ensure that providing greater opportunities for minorities did not come at the expense of the individual rights of the non-minority students.⁹ The case involved the university's medical school, which had two separate admission pools—one for standard applicants, and the other for minorities and economically disadvantaged students.¹⁰ Each school year, the school reserved sixteen slots for minorities and economically disadvantaged students.¹¹ Justice Powell, in the *Bakke* case, held that the use of these inflexible quotas for set-aside admissions was unacceptable and thereby declared that the dual affirmative action program was unconstitutional if it led to *reverse discrimination*.¹² The *Bakke* court also planted

grams (OFCCP) coordinated these and other equal opportunity efforts and helped to improve their management. In 1970, it was extended to non-construction federal contractors. *Id.*

9. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978); see generally Borgna Brunner, *Timeline of Affirmative Action Milestones*, available at <http://www.infoplease.com/spot/affirmativetimeline1.html> (last visited Sept. 9, 2003) (outlining the sequence of affirmative events that occurred from Executive Order 10,925 to *Grutter*).

10. *Bakke*, 438 U.S. at 273-74.

11. *Id.* at 275.

12. 438 U.S. at 289; see also *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (stating that two white employees and one black employee were charged with stealing property from their employer. The two white employees were fired while the black employee was retained. In the first reverse discrimination case, the Court decided that Title VII is not limited to discrimination against minority persons, but includes discriminatory actions against majority persons as well); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (striking down the race-conscious admissions program of the University of Texas Law School. The school used lower minimum criteria for African American and Mexican American candidates than for other candidates. The Court held contrary to *Bakke* that obtaining a racially diverse student body is not a compelling interest under the Fourteenth Amendment); *Middletown v. City of Flint*, 92 F.3d 396 (6th Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) (stating that white police officers were passed over for promotions because of voluntary affirmative action plan involving a 50% set aside of promotions to Sergeant for racial minorities. The court

the seed that would fully develop in *Grutter* —that race could serve as a factor in admissions and that the inclusion of minority students would create a diverse student body that would be beneficial to the educational environment as a whole.¹³

Yet, while race could still be used as a factor in admissions and job selection, the focus of the criticism against affirmative action was primarily directed at quotas. In *Fullilove v. Klutznick*, the Court reversed directions and upheld a federal law requiring that 15% of funds for public works be set aside for qualified minority contractors, stating that the “narrowed focus and limited extent” of the affirmative action program did not violate the rights of the non-minority,¹⁴ and that there was no “allocation of federal funds according to inflexible percentages solely based on race or ethnicity.”¹⁵ In other words, *flexible quotas* were acceptable as long as they were narrowly focused and limited.¹⁶ Nevertheless, in *Wygant v. Jackson Board of Education*, when a school board *hiring goals* policy caused the protection of minorities from being laid off while non-minorities with

found the plan to be an “unnecessarily drastic remedy”); *Police Ass’n of New Orleans v. City of New Orleans*, 100 F.3d 1159 (5th Cir. 1996) (stating that the city’s race conscious promotions violated Equal Protection Clause because they were not narrowly tailored); *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993) (requiring an additional showing for white plaintiffs in reverse discrimination cases over and above what would be required by minority plaintiffs. The court held that because racial discrimination against white persons is so rare, in order to establish the necessary inference of discrimination, white plaintiffs must prove “background circumstances” that “support the suspicion that the defendant is that unusual employer who discriminates against the majority”); *Lucas v. Dole*, 835 F.2d 532 (4th Cir. 1987) (refusing to adopt the D.C. Circuit’s “background circumstances” requirement and instead applied the *McDonnell Douglas* test in the same way to white and black plaintiffs. The white plaintiff satisfied her burden in this case where she showed that she was more qualified than the selected minority applicant, that the interviewing process was too subjective, that the minority applicant had received irregular acts of favoritism, and that other employees believed that race was a factor).

13. 438 U.S. 265.

14. *Fullilove v. Klutznick*, 448 U.S. 448, 456 (1980) (stating that minority set-aside program was a legitimate exercise of congressional power). The Court found that Congress could pursue the objectives of the minority business enterprise program under the Spending Power. *Id.* The plurality opinion noted that Congress could have regulated the practices of contractors on federally funded projects under the Commerce Clause as well. *Id.* The Court further held that in the remedial context, Congress did not have to act “in a wholly ‘color-blind’ fashion.” *Id.* at 482.

15. *Id.* at 473.

16. *Id.* at 456.

more seniority were discharged, the Court found that the injury caused to non-minorities could not justify the benefits to minorities.¹⁷ The issue was thereafter framed as *benefits to minorities versus injuries to non-minorities*.

There was one last effort to show that affirmative action programs were still needed in some parts of America. In 1987, a federal court found that the State of Alabama Department of Public Safety systematically discriminated against blacks in hiring because "[i]n the thirty-seven year history of the patrol there has never been a black trooper."¹⁸ The federal district court ordered the state to reform its practices.¹⁹ Twelve years later, the State continued its pervasive discriminatory exclusion of blacks.²⁰ The federal district court ordered blacks to be hired until 25% of the upper ranks were composed of blacks.²¹ The quota was challenged, and in *United States v. Paradise* the Supreme Court upheld the use of *strict quotas* to correct the department's overt and defiant racism.²² But several years later, in 1989, the City of Richmond, Virginia was challenged for promoting a program setting aside 30% of the city's construction funds for black owners.²³ The court stated that "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."²⁴ Furthermore, the court stated that there is simply no way of determining which aspects of public decision making regarding affirmative action "are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."²⁵ The court added that strict scrutiny was necessary to ascertain the outcome of the city's objective: "[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is

17. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986).

18. *United States v. Paradise*, 480 U.S. 149, 154 (1987).

19. *Id.* at 162.

20. *Id.*

21. *Id.* at 163.

22. *Id.* at 187.

23. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); see also Rodolpho Sandoval, *An Analysis of the New Legal Model for Establishing Set-Aside Programs for Minority Business Enterprise: The Case of City of Richmond v. J.A. Croson Co.*, 25 GONZ. L. REV. 141 (1990).

24. *Richmond*, 488 U.S. at 499.

25. *Id.* at 493.

pursuing a goal important enough to warrant use of a highly suspect tool,"²⁶ i.e. affirmative action. "The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."²⁷ The fundamental rationale and the *original* purpose for affirmative action as articulated by President Johnson in 1965 were changed forever.²⁸

Notwithstanding the fact that *Bakke* had prohibited having two separate admissions pools in 1978, the University of Texas Law School established one pool for minorities and one for non-minorities.²⁹ The response was swift. Cheryl Hopwood sued the University of Texas Law School and challenged the affirmative action program alleging unfair preference towards less qualified minorities applicants.³⁰ In *Hopwood v. Texas*,³¹ the Fifth Circuit suspended the program claiming that *Bakke* was wrongly decided, that diversity was not a legitimate goal, and educational diversity is not recognized as a compelling state interest.³² Subsequently, the Attorney General of Texas extended the ruling to all Texas public universities, stating that they should employ race-neutral criteria.³³ Upon appeal, the Supreme Court rejected the case and allowed the decision to

26. *Id.*

27. *Id.*

28. See Johnson, *supra* note 4.

29. Hopwood v. Texas, 861 F. Supp. 551, 558 (W.D. Tex. 1994).

30. *Id.*

31. Hopwood v. Texas, 21 F.3d 603 (5th Cir.), *aff'g* 861 F. Supp. 551 (W.D. Tex. 1994).

32. Hopwood, 861 F. Supp. 551; see also Gerald Torres, *Symposium: On Grutter and Gratz: Examining "Diversity" in Education: Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1596-97 (2003). Torres states that

The Hopwood v. Texas decision was breathtaking in its disdain for the Supreme Court's educational equal protection jurisprudence. That disdain was combined with the . . . proviso . . . in which the Fifth Circuit threatened individual liability if race were smuggled back into the decisionmaking process. This was reinforced by the then Texas Attorney General's opinion that the case was rightly decided and should be interpreted expansively to cover recruiting, financial aid, and the like.

Id.

33. Effect of *Hopwood v. Texas* on Various Scholarship Programs of the University of Houston, 97 Op. Att'y Gen. 001 (1997), available at <http://www.oag.state.tx.us/opinions/lo48morales/lo97-001.htm> (Feb. 5, 1997).

stand.³⁴ Thirty-five years of work on affirmative action efforts were quietly dismantled in the Fifth Circuit, which includes the states of Texas, Louisiana and Mississippi.³⁵ The three years following the *Hopwood* case saw the dismantling of affirmative action programs by the states with the largest number of Hispanics in the United States, namely California,³⁶ Washington,³⁷ and Florida.³⁸

On June 23, 2003, the Supreme Court, in the most important case addressing the issue of race in education since *Bakke*, in a 5 to 4 decision, upheld the University of Michigan Law School admission policy³⁹ where the Supreme Court moved "From Affirmative Action to Affirming Diversity."⁴⁰ This article is an analysis of the *Grutter v. Bollinger*⁴¹ case.

34. See *Hopwood*, 21 F.3d 603, cert. denied, No. 00-1609, 2001 U.S. LEXIS 4722 (U.S. Mar. 20, 1998).

35. See generally *Hopwood*, 21 F.3d 603.

36. Cal. Const. art. I, § 31, also known as "California Proposition 209" (Nov. 1997), available at <http://vote96.ss.ca.gov/Vote96/html/BP/209text.htm> (last visited Oct. 3, 2004) (The Proposition was passed on Nov. 6 by 54% of California voters). The proposition states:

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. . . . [but] c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

Id.

37. See Adversity.net, *Washington State Initiative 200 Ends Racial Quotas!*, available at <http://www.adversity.net/i200.htm#i200text> (last visited Oct. 3, 2004); see also ROBERT HOLLAND, WASHINGTON POLICY CENTER, TOWARD AN EQUAL SOCIETY: MAKING INITIATIVE 200 WORK, available at <http://www.washingtonpolicy.org/ECP/PBHollandECPMakingI200Work.html> (May 1999) On November 3, 1998, Washington state voters passed Initiative 200, the Washington State Civil Rights Initiative. The measure passed by 58.2% of the 1.9 million votes cast.

38. See Governor Jeb Bush's "One Florida" initiative (Feb. 2000), available at http://www.state.fl.us/eog/executive_orders/1999/november/eo99-281.html (Nov. 9, 1999) (Governor Jeb Bush signed an executive order on November 9th that would eliminate the use of race and ethnicity in admissions and contracting decisions. It basically eliminated Affirmative Action by doing away with race-sensitive admissions policies and contracting).

39. See *Grutter*, 539 U.S. 306.

40. See generally R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirming Diversity*, HARV. BUS. REV., Mar.-Apr. 1990.

41. 539 U.S. 306.

III. The *Grutter v. Bollinger* CaseA. *The Grutter Facts*

The University of Michigan Law School follows an official admissions policy that seeks to achieve student body diversity through compliance with *Bakke*.⁴² Barbara Grutter, a 49 year-old Michigan resident with a 3.8 GPA and 161 LSAT score, submitted an application for admission to the Law School in 1997.⁴³ She was initially placed on the waiting list, but was subsequently rejected.⁴⁴ She alleged that [the University of Michigan] discriminated against her on the basis of race in violation of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, [and] 42 U.S.C. § 1981 Petitioner further alleged that she was rejected because the Law School uses race as a “predominant” factor, giving applicants who belong to certain minority groups “a significantly greater chance of admission than students with similar credentials from disfavored racial groups;” [and that] respondents “had no compelling interest to justify their use of race in the admissions process.”⁴⁵ The District Court for the Eastern District of Michigan⁴⁶ agreed with the Plaintiff and found the Law School’s use of race as an admission factor unlawful.⁴⁷ That court applied the strict scrutiny test and determined that the Law School’s asserted interest in assembling a diverse student body was *not* compelling because “the attainment of a racially diverse class . . . was not recognized as such by *Bakke* and is not a remedy for past discrimination.”⁴⁸ And even if diversity⁴⁹ were compelling, the district

42. 438 U.S. 265.

43. *Grutter*, 539 U.S. at 320. See generally David M. White, *The Requirement of Race-Conscious Evaluation of LSAT Score for Equitable Law School Admissions*, 12 BERKELEY LA RAZA L.J. 400, 403 (2001) (arguing that the LSAT produces a discriminatory impact significantly greater than can be accounted for on the basis of prior academic achievement).

44. *Grutter*, 539 U.S. at 316.

45. *Id.* at 317 (internal citations omitted).

46. See R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 TEX. REV. L. & POL. 313, 328 (outlining the procedural history of the *Grutter* case).

47. *Grutter v. Bollinger*, 16 F. Supp. 2d 797 (1998) (vacating the injunction prohibiting the law school from considering race and ethnicity in its admission decision).

48. *Grutter*, 539 U.S. at 321 (citing Appellant’s Application for Cert. at 246a).

court⁵⁰ avers that Michigan Law School had not narrowly tailored its use of race to further that interest.⁵¹ Upon appeal by the Law School, the Sixth Circuit court sitting en banc⁵² reversed the district court's judgment, holding that (1) Justice Powell's opinion in *Bakke*⁵³ was binding precedent establishing diversity⁵⁴ as a compelling state interest;⁵⁵ (2) that the Law School's use of race was narrowly tailored⁵⁶ because race was merely a "potential 'plus' factor"; and (3) that it was further narrowly tailored because the Law School's program was virtually identical to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion.⁵⁷ The Supreme Court issued a writ of certiorari to the United States Court of Appeals for the Sixth Circuit Court upon an appeal by the Plaintiff.⁵⁸ The issue before the Supreme Court was

49. See generally Barbara Lauriat, *Trump Card or Trouble? The Diversity Rationale in Law and Education*, 83 B.U. L. REV. 1171, 1173 (2003) (outlining a history of "Diversity" in education admission policies).

50. See Purdy, *supra* note 46, at 328 (discussing the procedural history in the *Grutter* case).

51. *Grutter*, 539 U.S. at 321.

52. See also Purdy, *supra* note 46, at 345-58 (discussing Chief Judge Martin's majority opinion and Judge Clay's concurring opinion, in addition to Judge Boggs' analysis of "narrow tailoring," and Judge Gilman's dissent); see generally Police Ass'n of New Orleans v. City of New Orleans, 100 F.3d 1159 (5th Cir. 1996) (stating that the city's race conscious promotions violated the Equal Protection Clause because they were not narrowly tailored).

53. See *Bakke*, 438 U.S. 265.

54. Cf. Douglass C. Lawrence, *Challenging Affirmative Action: Does Diversity Justify Race-Conscious Admissions Programs?* 36 SUFFOLK U. L. REV. 83 (2002) (tracing affirmative action jurisprudence from *Bakke* to the present and examining the judicial uncertainty surrounding the diversity rationale).

55. But cf. Ryan C. Idzior, *The Sixth Circuit Holds that Diversity in Higher Education is a Compelling State Interest and that the Admissions Program at the University of Michigan Law School is Narrowly Tailored to Further That Interest*, 56 SMU L. REV. 1031 (2003) (arguing that the Sixth Circuit has endorsed an admissions program that violates students' equal protection rights and impedes the realization of true diversity).

56. But cf. Marianne M. Ibrahim, Oh, *The Places You Will Go—Or Not Go: Balancing the Weight Diversity May Play in Higher Education Admissions Policies with One Supreme Court Justice's Opinion in Grutter v. Bollinger*, 43 TEX. L. REV. 912, 925 (2002) (arguing that the law school admission policy was not narrowly tailored).

57. *Grutter v. Bollinger*, 288 F.3d 732 (2002) (reversing the District Court).

58. *Grutter v. Bollinger*, 537 U.S. 1043 (2002).

whether diversity is a compelling state interest⁵⁹ that can justify the narrowly tailored use of race as a factor in student admissions by the University of Michigan Law School.⁶⁰

B. *The Fourteenth Amendment and Equal Protection*

Barbara Grutter alleged that the University of Michigan discriminated against her on the basis of race in violation of the Equal Protection Clause⁶¹ of the Fourteenth Amendment.⁶² When legalese is stripped away, the argument is that the university discriminates against Whites in favor of Blacks, Native Americans and Hispanics. The Fourteenth Amendment⁶³ of the Constitution of the United States was passed by both houses of Congress on June 8th, 1866. The irony of the plaintiff's argument is that the amendment was originally designed to grant citizenship to and protect the civil liberties of *recently freed slaves*.⁶⁴ The amendment prohibited states from denying or abridging the privileges or immunities of citizens of the United States, "depriv[ing] any person of [his] life, liberty, or property, without due process of law; [or] deny[ing] to any person within its jurisdiction the equal protection of the laws."⁶⁵ The amendment by its express terms provides that "[n]o State" and "nor shall any State" engage in the proscribed conduct.⁶⁶ "It is State action of a particular character that is prohibited. . . . It nullifies

59. Compare *Hopwood*, 78 F.3d 932 (holding that diversity is not a compelling state interest), with *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (holding that diversity is a compelling state interest).

60. See *Grutter*, 539 U.S. 306.

61. See generally Kevin Joyner, *The Use of Race in the Admissions Programs of Higher Educational Institutions-A Violation of the Equal Protection Clause*, 19 CAMPBELL L. REV. 489 (1997) (arguing that the use of race in admissions programs of higher educational institutions is a violation of the equal protection clause).

62. See *Grutter*, 539 U.S. 306.

63. U.S. CONST. amend. XIV; see also Lawrence, *supra* note 54, at 85 (outlining the Fourteenth Amendment and the standard of review).

64. See Steve Russell, *Seeking Justice: Critical Perspectives of Native People: A Black and White Issue: The Invisibility of American Indians in Racial Policy Discourse*; 4 GEO. PUBLIC POL'Y R. 129, 134 (1999).

65. U.S. CONST. amend. XIV.

66. U.S. CONST. amend. XIV, § 1. Stating that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

and makes void all State legislation, and State action of every kind, which . . . denies to any of them the equal protection of the laws.”⁶⁷ The plaintiff’s fundamental argument was that the University of Michigan is a state institution and that its admission policy denied equal protection under the law to her because the University discriminated against her on the basis of race.⁶⁸

1. *Racial Classification*

The Supreme Court noted that since the Fourteenth Amendment to the Constitution

protect[s] *persons*, not *groups* . . . all governmental action based on race—a *group* classification long recognized as “in most circumstances irrelevant and therefore prohibited”—should be subjected to detailed judicial inquiry to guarantee that the *personal* right to equal protection of the laws has not been infringed.⁶⁹

But this is a conclusion that was not very clear thirteen years ago.⁷⁰ Nevertheless, the court has concluded that group classifications are *suspect* if the classification is by race because “[w]e are a ‘free people whose institutions are founded upon the doctrine of equality.’”⁷¹ The Constitution does not forbid government disparate treatment of groups *per se*, but the “government may treat people differently because of their race only for the

nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

67. *United States v. Stanley*, 109 U.S. 3, 11 (1882).

68. *See Grutter*, 539 U.S. 306; *see also* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2004); 42 U.S.C. § 1981 (2004).

69. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (internal citation omitted) (emphasis in original) (The petitioner, who submitted the low bid on a subcontract but was not certified as having a small disadvantaged business, filed suit against respondent, federal officials, claiming that the race-based presumption used in subcontractors’ compensation clauses violate the equal protection component of the Fifth Amendment due process clause. The court held that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.). *But cf.*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (overruling federal racial classifications to be subject to a less rigorous standard).

70. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

71. *See also Grutter*, 539 U.S. at 326 (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)). *But see Loving*, 388 U.S. at 11 (stating that “[a]t the very least, the Equal Protection Clause demands that racial classifications, especially suspect in *criminal statutes* [not civil], be subjected to the ‘most rigid scrutiny[.]’” (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)(emphasis added))).

*most compelling reasons.*⁷² Race-based classification is constitutional⁷³ only if it is narrowly tailored⁷⁴ to further a compelling governmental interest.⁷⁵ Because “[n]ot every [state] decision influenced by race is equally objectionable . . . strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the government’s reasons for using race in a particular context.”⁷⁶ Therefore, racial classifications⁷⁷ imposed by the government “must be analyzed by a reviewing court under *strict scrutiny*.”⁷⁸ Strict scrutiny is applied to “smoke out” an illegitimate use of race by ensuring that

72. See *Adarand Constructors*, 515 U.S. at 227 (emphasis added).

73. *Accord Bakke*, 438 U.S. 265 (1978); see generally, Derrick Bell, *Symposium: On Grutter and Gratz: Examining “Diversity” in Education: Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1625 n.19 (2003). But cf. *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (5-4 decision) (O’Connor, J.) (stating that “[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.” (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954))).

74. Ibrahim, *supra* note 56 (analyzing whether the Michigan Law School Policy was narrowly tailored).

75. See *Grutter*, 539 U.S. 306 (2003); see also *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Cf. *Metro Broad.*, (stating that congressionally mandated benign racial classifications need only satisfy *intermediate scrutiny*. The Court ignored the explanation in *Croson*, that *strict scrutiny* of governmental racial classifications is essential because it may not always be clear that a so-called preference is in fact benign and rejected the proposition of congruence between the standard applicable to federal and state race-based action); But cf. *Adarand Constructors*, 515 U.S. at 227 (overruling *Metro Broad.*, on these conclusions).

76. *Grutter*, 539 U.S. at 321; see also *Wygant v. Jackson Bd. of Educ.* 476 U.S. 267, 285-86 (1986) (5-4 decision) (O’Connor, J., concurring) (stating that “the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable to individual Members of the Court.” (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982)); Bell, *supra* note 73, at 1626 n.20; Ibrahim, *supra* note 56, at 914 (elaborating on “The Evolution of the Strict Scrutiny Test in Racial Classifications” cases).

77. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); see also Sandoval, *supra* note 22. *Croson* established three general propositions with respect to governmental racial classifications. First, “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.” *Wygant*, 476 U.S. at 273. Second, “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.” See *Croson* 488 U.S. at 494. And finally, “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

78. *Grutter*, 539 U.S. at 326 (quoting *Adarand Constructors*, 515 U.S. at 227).

the “government is pursuing a goal important enough to warrant use of a highly suspect tool.”⁷⁹

The Court then posits the question of whether the Law School’s admission policy of using race as a classification is justified by a compelling governmental interest. The Court argues that the Law School’s justification for the use of race is “the educational benefits that flow from a diverse student body.”⁸⁰ Therefore, the question becomes whether student body diversity is a compelling state interest.⁸¹ Justice O’Connor stated “[t]oday, we hold that the Law School has a compelling interest in attaining a diverse student body.”⁸² The Court’s rationale was that such diversity is essential to the Law School’s educational mission.⁸³ Justice O’Connor argued that since the Law School is the entity that creates its mission, the academic decisions should be deferred to the expertise of the school.⁸⁴

C. *Deference to University Academic Decisions*

Justice O’Connor stated that universities hold a special place in our society and that they should be given special deference with respect to their academic decisions.⁸⁵ She stated that the Court will give the university a degree of deference with respect to its academic decisions, but within constitutionally proscribed limits.⁸⁶ The Court reemphasized the principle that educators’ judgments have “a constitutional dimension, grounded in the First Amendment, of educational autonomy.”⁸⁷ In other words, the Court has clothed institutions of higher learning with “educational autonomy” and the responsibility to fashion a workable framework to achieve the objectives of diversity through admis-

79. *Croson*, 488 U.S. at 493.

80. *Grutter*, 539 U.S. at 328.

81. *Id.* Cf. Bell, *supra* note 73, at 1622 (arguing that the concept of diversity is a serious distraction in the ongoing efforts to achieve racial justice).

82. *Grutter*, 539 U.S. at 328.

83. *Id.*

84. *Id.*

85. *Id.* at 329.

86. *Id.* See also Kermit L. Hall, Speech at the Harvard Graduate School of Education Affirmative Action Forum, Yes, It is Important to Consider Diversity in Admission: But Where are the Bridges to Success? (Nov. 1, 2003) (arguing that the most important feature of the *Grutter* decision is the Supreme Court’s willingness to defer to the judgment of institutions of higher education) (on file with author).

87. *Grutter*, 539 U.S. at 329.

sions programs as long as they are holistic, narrowly tailored, aimed at forming a critical mass, and stricken of anything resembling a quota.⁸⁸ In an interesting deviation from the focal issue, the court decides to make the Law School a constitutional partner with the responsibilities of determining for itself the degree of diversity necessary to pass muster under the Constitution. It cites six cases to support the argument for the Law School's educational autonomy, five of which have little or no bearing on primary issues before the Court.⁸⁹

First, Justice O'Connor cites *Regents of University of Michigan v. Ewing* to support the proposition for "giving a degree of deference to a university academic decision" with respect to framing a diversified admissions program.⁹⁰ In *Ewing*, a student was enrolled at the University of Michigan in a 6-year program of combined undergraduate and medical education.⁹¹ The student was dismissed from the program at the medical school for failing with the lowest score recorded in the history of the program.⁹² The student sought readmission to the program and an opportunity to retake the examination, but was refused.⁹³ In the suit, the plaintiff alleged that: (1) he had a property interest in his continued enrollment in the program, and (2) his dismissal was arbitrary and capricious in violation of his substantive due process rights guaranteed by the Fourteenth Amendment.⁹⁴ The Supreme Court held that assuming that the student had a property interest in his continued enrollment in the medical program, his dismissal from the program was not arbitrary and capricious since the record showed that the decision to dismiss the student was made conscientiously and with careful deliberation,⁹⁵ based on an evaluation of the student's entire academic

88. *Id.*

89. The Court cites *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Shelton v. Tucker*, 364 U.S. 479 (1960); and *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589 (1967). *Id.* at 328-29.

90. *Id.* at 328.

91. *Ewing*, 474 U.S. at 215.

92. *Id.* at 216.

93. *Id.* at 217.

94. *Id.*

95. *Id.* at 225 (holding that the court will not overrule the university's decision "unless it is such a substantial departure from accepted academic norms as to

career at the university, including his low scores.⁹⁶ The Court stated that on matters of “a genuinely academic decision,”⁹⁷ such as dismissal of a student, the Court “should show great respect for the faculty’s professional judgment.”⁹⁸ The distinction between *Grutter* and *Ewing* is that in *Ewing*, the Court grants a degree of deference to the university with respect to evaluating a student’s qualifications and performance for dismissal and readmission. This authority is an administrative power that universities possess to implement and maintain the integrity of their degree granting function. There are no race, diversity or equal protection issues in *Ewing*. In *Grutter*, the Court gives deference to the university with respect to creating an entire admissions framework based on diversity’s allowing racial classification. In other words, it appears as if the *Grutter* case has expanded the breadth of the “degree of deference” given to the university beyond *Ewing*.

The Court also cites *Board of Curators of the University of Missouri v. Horowitz* to support its argument for “giving a degree of deference to a university, academic decision.”⁹⁹ While *Horowitz* is similar to *Ewing* in that a student was dismissed from medical school because of low performance grades, the issue in *Horowitz* was not about the authority of the university to make an academic decision, but rather whether the university had complied with the procedural protection requirement of the Fourteenth Amendment by dismissing the student, and whether the student had been deprived of her liberty or property interest.¹⁰⁰ Justice Rehnquist, who delivered the majority opinion in *Horowitz*, stated that the student had been awarded at least as much due process as the Fourteenth Amendment required, since the student had been fully informed of the decision to dismiss her after careful and deliberate discussions, which took place without any arbitrariness or capriciousness on the part of the university.¹⁰¹ The Court argued that “university fac-

demonstrate that the person or committee responsible did not actually exercise professional judgment”).

96. *Ewing*, 474 U.S. at 425.

97. *Id.*

98. *Id.*

99. *Grutter*, 539 U.S. at 329.

100. *Horowitz*, 435 U.S. at 80.

101. *Id.* at 92.

ulties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.”¹⁰² Again, while *Horowitz* expressly allows the university the “widest range of discretion,” it only does so with respect to student entitlements in retention and readmission.¹⁰³ The issue in *Horowitz* concerned the Due Process Clause of the Fourteenth Amendment. Again, *Grutter* seems to go beyond *Horowitz* in expanding the sphere of deference given to university academic decisions.

The Court in *Grutter* also argued that “universities occupy a *special niche* in our constitutional tradition” because it has “long [been] recognized that . . . the important purpose of public education and the expansive freedoms of speech and thought [are] associated with the university environment,”¹⁰⁴ citing *Wieman v. Updegraff*¹⁰⁵ to support its proposition. In *Wieman*, the salary of a faculty employee at Oklahoma State College was frozen because the employee refused to subscribe to the “loyalty oath” required by a state statute.¹⁰⁶ Justice Clark, delivering the majority opinion, concluded that the state statute that seeks to bar a disloyal person from state employment by requiring employees to disavow membership in or affiliation with specified organizations violates the constitutional guarantees of free-

102. *Id.* at 96 n.6.

103. *Id.*

104. *Grutter*, 539 U.S. at 329 (emphasis added); see also *Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring). Justice Frankfurter stated that “the process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.” *Wieman*, 344 U.S. at 196. Furthermore, he notes that “a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought.” *Id.* at 197 (quoting *Tax-Exempt Foundations and Comparable Organizations: Hearing on H. Res. 561 Before the House Select Comm.*, 82nd Cong. 2d Sess. (1952) (testimony of Robert M. Hutchins, Assoc. Dir., Ford Foundation)). The center of independent thought, in this case, provides the framework for the special niche discussed in *Grutter*, notwithstanding the disconnect with the state loyalty oath requirement.

105. See *Wieman*, 344 U.S. 183.

106. *Id.* at 186 (stating the loyalty oath, “[a]nd I do further swear (or affirm) that I do not advocate . . . the overthrow of the Government of the United States . . . That I am not affiliated directly or indirectly with the Communist Party . . . any foreign political agency . . . or group whatever which has been officially determined by the United States Attorney General . . . to be a communist front or subversive organization. . . .”).

dom of thought, speech and press.¹⁰⁷ The only educational institutional connection in *Wieman* is that the plaintiff, a state employee, who was asserting his constitutional right of freedom of thought and speech, also happened to be an employee of the university.¹⁰⁸ He could have been a city employee,¹⁰⁹ an employee at a public school¹¹⁰ or a candidate for office.¹¹¹ Do these other entities also have a *special niche* in our constitutional tradition because an employee refuses to subscribe to a loyalty oath? It is, therefore, difficult to reason from the *Wieman* case why "universities occupy a special niche in our constitution."¹¹²

The Court in *Grutter* also cited *Sweezy*,¹¹³ and stated that "we have long recognized . . . the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment" to support the proposition that "universities occupy a special niche in our constitutional tradition."¹¹⁴ In *Sweezy*, a witness refused to answer questions from the Attorney General attempting to enforce the New Hampshire Subversive Activities Act concerning the Progressive Party and a lecture given at a state university.¹¹⁵ The Court concluded in *Sweezy* that the Attorney General's investigation, licensed under the Subversive Activities Act, "was an invasion of [the witness's constitutional] liberties in the areas of academic freedom and political expression" ¹¹⁶ Here, the only connection that the plaintiff had with the university is

107. *Id.* at 191.

108. *See id.* at 185.

109. *See* *Garner v. Bd. of Pub. Works*, 341 U.S. 716, 724 (1951) (holding that a Los Angeles ordinance requiring all city employees to swear that they did not advocate the overthrow of the government by unlawful means and did not belong to organizations with such objectives is lawful).

110. *See* *Adler v. Bd. of Educ.*, 342 U.S. 485, 489 (1952) (stating that the State of New York sought to bar from employment at public schools persons who advocate, or belong to organizations which advocate, the overthrow of the government by force, violence, or any unlawful means).

111. *See* *Gerende v. Bd. of Supervisors*, 341 U.S. 56, 56-57 (1951) (stating that an oath was required of candidates for public office who sought places on a Maryland ballot).

112. *Grutter*, 539 U.S. at 329.

113. 354 U.S. 234, 250 (1957).

114. *Grutter*, 539 U.S. at 330.

115. *Sweezy*, 354 U.S. at 238.

116. *Id.* at 250.

that he delivered a lecture to the faculty and student body.¹¹⁷ The action does not even involve the university. Taking this argument to its logical conclusion, one could argue that there are expansive freedoms of speech and thought associated with city councils and public park environments since lectures are often given there as well. Therefore, city councils and public park environments also occupy a *special niche* in our Constitution.

The next case that the Court cites in *Grutter* to support its proposition that universities occupy a *special niche* in our constitution is *Shelton v. Tucker*.¹¹⁸ In *Shelton*, an Arkansas statute required every teacher, as a condition of employment in a state-supported school or college, to file an affidavit annually listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years.¹¹⁹ Justice Stewart, writing for the majority in *Shelton*, concluded that a statute compelling a teacher to disclose every associational tie impairs his right to freedom of association, which is closely tied to freedom of speech, and like free speech, lies at the foundation of a free society.¹²⁰ *Grutter* emphasized the “expansive freedoms of speech and thought associated with the university environment” to recognize the *special niche* that universities occupy in our Constitution.¹²¹ But the issue in *Shelton*¹²² is more closely aligned to the First Amendment right of freedom of association, than with freedom of speech or thought. In other words, the Court’s argument for “special niche in our constitution” is left hanging without a connection between “freedom of association” on the one hand and “special niche” on the other.

Finally, the Court cites *Keyishian v. Board of Regents*¹²³ to support its proposition that freedom of speech and thought have been traditionally associated with the university environment.¹²⁴ In this case, the appellant faculty member of the State University of New York claimed that New York’s teacher loy-

117. See *id.* at 243.

118. *Shelton v. Tucker*, 364 U.S. 479 (1960).

119. *Id.* at 480.

120. *Id.* at 485-87.

121. *Grutter*, 539 U.S. at 330.

122. *Shelton*, 364 U.S. at 487.

123. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

124. *Grutter*, 539 U.S. at 330.

alty laws and regulations requiring certification that he was not a Communist were unconstitutional.¹²⁵ In the majority opinion written by Justice Brennan, the Court held that: (1) statutes requiring or authorizing the removal of faculty members for seditious *utterances* were unconstitutionally vague because a "teacher could not know the extent . . . to which [the] utterance must transcend mere statements about abstract doctrine," and (2) statutes banning state employment of any person advocating or *distributing material* which advocates forceful overthrow of government were unconstitutionally vague as possibly prohibiting advocating the doctrine in the abstract.¹²⁶ The issue in *Keyishian* is clearly about safeguarding academic freedom.¹²⁷ Brennan further states that "First Amendment freedoms need breathing space to survive,"¹²⁸ and that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."¹²⁹ The Court concluded that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."¹³⁰ Reaching from *Keyishian's* First Amendment freedom of speech argument that universities have a *special niche* in the constitutional tradition to make academic decisions with respect to its function to grant degrees to *Grutter's* conclusion that law schools have a compelling interest to diversify the student body utilizing race as a factor is a long legal leap. The *Grutter* Court concludes by saying that "good faith [on the part of a university] is presumed in the absence of a showing to the contrary."¹³¹

125. *Keyishian*, 385 U.S. at 592.

126. *Id.* at 599-600, 605 (stating also that statutes making Communist Party membership prima facie evidence of disqualification unconstitutionally abridged freedom of association by not permitting rebuttal by proof of non-active membership or absence of intent to further unlawful aims).

127. *Id.* at 603.

128. *Id.* at 604.

129. *Id.* at 603 (quoting *Shelton*, 364 U.S. at 487).

130. *Keyishian*, 385 U.S. at 603.

131. *Grutter*, 539 U.S. at 308 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317-318 (1978)).

D. Diversity As a Compelling State Interest For the Use of Race

Justice O'Connor, writing for the majority, states that the Court "endorse[s] Justice Powell's view [in *Bakke*] that student body diversity¹³² is a *compelling state interest* that can justify the use of race in university admissions"¹³³ because "attaining a diverse student body is at the heart of the Law School's proper institutional mission."¹³⁴ Hence, the Court was able to shift the issue from the use of *affirmative action*¹³⁵ to admit minorities into law schools to using *diversity*¹³⁶ as an important factor to diversify the institution. The Court added that to fulfill its mission, the Law School has the right to select those students who will contribute the most to the "robust exchange of ideas."¹³⁷ The goal of the Law School is to "assembl[e] a class that is both exceptionally academically qualified and broadly diverse."¹³⁸ To achieve this goal the "Law School seeks to enroll a 'critical

132. For an interesting commentary on "diversity, critical mass and racial quotas," see Commentary, *The Muddled World of Affirmative Action*, W. MASS. L. TRIB., Oct. 2003, § 4, No. 10, at 15 [hereinafter *Muddled*].

133. *Grutter*, 539 U.S. at 308 (emphasis added).

134. *Id.* at 330. *But see* Bell, *supra* note 73, at 1622. The court states that the concept of diversity, far from a viable means of ensuring affirmative action in the admissions policies of colleges . . . is a serious distraction in the ongoing efforts to achieve racial justice: (1) Diversity enables courts and policy makers to avoid addressing directly the barriers of race and class that adversely affect so many applicants; (2) Diversity invites further litigation by offering a distinction without a real difference; . . . (3) Diversity serves to give undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants; and (4) the . . . attention directed at diversity programs diverts concern and resources from the serious barriers . . . that exclude . . . students from entering college

Id.

135. *Cf. Muddled*, *supra* note 133 (stating that "the Court's attempt to have its cake – preserving some role for race in admissions decision – and eat it too – but no quotas- resulted, . . . in analytic incoherence"); *cf.* Pauline T. Kim, *The Color-blind Lottery*, 72 FORDHAM L. REV. 9, 9 (2003) (stating that "the Supreme Court has once again sent mixed messages about affirmative action, upholding the use of race by Michigan Law School, but striking down the University of Michigan's undergraduate admissions policies").

136. See Barbara Lauriat, Note, *Trump Card or Trouble? The Diversity Rationale in Law and Education*, 83 B.U. L. REV. 1171, 1173 (2003) (outlining the history of "diversity" in education admission policies).

137. *Grutter*, 539 U.S. at 323 (quoting *Bakke*, 438 U.S. at 313).

138. *Grutter*, 539 U.S. at 329 (quoting Respondent's Brief at 13).

mass¹³⁹ of minority students,”¹⁴⁰ where the “concept of critical mass is defined by reference to the *educational benefits* that diversity is designed to produce.”¹⁴¹ Therefore, whether the Law School has a compelling interest to justify the use of *race*¹⁴² in law school admissions is dependent upon the *benefits of diversity*, which were succinctly outlined by the Court and discussed *infra* in this article.

1. Bakke’s “race” legacy

The last time that the Supreme Court addressed the issue of race was 25 years ago in the landmark *Bakke* decision.¹⁴³ In that case, the Court addressed the issue of a racial set-aside program in which the Court invalidated the set-aside program, but reversed the state court’s injunction against any use of race whatsoever.¹⁴⁴ The Court held that a “[s]tate has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”¹⁴⁵ Since then, *Bakke* has served as the “touchstone for constitutional analysis of race-conscious¹⁴⁶ admissions policies.”¹⁴⁷ Justice Powell’s premise was that when government decisions touch on an individual’s race or ethnic background, a judicial inquiry¹⁴⁸ would seek a precisely tailored basis,¹⁴⁹ serving a compelling governmental interest.¹⁵⁰ He,

139. See *cf. Muddled*, *supra* note 133, at 1 (stating that “[t]his is the ultimate triumph of form over substance, once the Court accepted racial diversity in higher education as a compelling interest, it is struck with a racial quota system, albeit a soft quota. Calling it a ‘critical mass’ does not change that.”)

140. *Grutter*, 539 U.S. at 329 (emphasis added).

141. *Id.* at 330 (emphasis added).

142. See Lauriat, *supra* note 136, at 1197 (discussing “Racial Diversity”).

143. See *Bakke*, 438 U.S. 265. See also Kenneth L. Karst, Symposium, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60 (2004) [hereinafter Karst] (stating that “when the *Bakke* case came before the Court, the appropriate standard of review for affirmative action was still an open question”).

144. *Bakke*, 438 U.S. at 272.

145. *Id.* at 320.

146. See generally Lawrence, *supra* note 54 (challenging affirmative action and asking whether diversity justifies race-conscious admissions programs).

147. *Grutter*, 539 U.S. at 307.

148. See Ibrahim, *supra* note 56, at 914 (discussing the evolution of the strict scrutiny test in racial classifications).

149. *But cf. Ibrahim*, *supra* note 56, at 930 (arguing that the law school’s admission policy was not narrowly tailored).

150. *Bakke*, 438 U.S. at 289-90.

therefore, approved the university's use of race to further "the attainment of a diverse student body"¹⁵¹ with the condition that "constitutional limitations protecting individual rights may not be disregarded."¹⁵² But *race* is only one element in a range of factors¹⁵³ for evaluating qualifications and characteristics.¹⁵⁴ Justice Powell states that "tradition and experience lend support to the view that the contribution of diversity is substantial."¹⁵⁵ Justice O'Connor, articulating the decision for the majority states, "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."¹⁵⁶

2. Race as a "Plus Factor"

A university may use "race" in its admission process, but only as a "plus factor" in context of individualized consideration of each and every applicant's file,¹⁵⁷ without "insulating the individual applicant from comparison with all other candidates for the available seats," as was done in *Bakke*¹⁵⁸ and subsequently *Hopwood*.¹⁵⁹ Citing *Johnson v. Transportation Agency*,¹⁶⁰ the Court states that "'a permissible goal' . . . permits consideration of race as a 'plus factor' in any given case while still ensuring that each candidate 'compete[s] with all other qualified applicants.'"¹⁶¹ But in *Johnson*, the issue was not race; it was gender.¹⁶² In *Johnson*, a female employee was pro-

151. *Id.* at 311.

152. *Id.* at 314.

153. *Id.*

154. *Id.* at 315.

155. *Bakke*, 438 U.S. at 313.

156. *Grutter*, 539 U.S. at 325. *But see* Bell, *supra* note 76, at 1622, 1625 (arguing that diversity avoids addressing directly barriers of race and class, and that the concept of diversity is similar to "affirmative action" policies which invite further litigation).

157. *See Grutter*, 539 U.S. at 334.

158. *Bakke*, 438 U.S. at 319 (stating that the Medical School had a rigid 16-seat quota).

159. *Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994). *See also* William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 BERKELEY LA RAZA L.J. 173 (2001).

160. *Johnson v. Transp. Agency*, 480 U.S. 616, 638 (1987).

161. *Grutter*, 539 U.S. at 355 (quoting *Sheet Metal Workers Int'l v. EEOC*, 478 U.S. 421, 495 (1986); *Johnson*, 480 U.S. at 638).

162. *Johnson*, 480 U.S. 616.

moted to a skilled-crafted job over an equally qualified male employee under an affirmative action plan.¹⁶³ The Court stated that a county agency was authorized to consider as one selection factor the sex of a qualified applicant, and that the consideration of the female applicant's sex was lawful.¹⁶⁴

Justice Powell, in *Bakke*, rejects the notion that using race as a plus factor or giving greater "weight" to race than to some other factors to achieve student body diversity is a quota.¹⁶⁵ But the fact that the "race plus factor" is not a quota does not make it legitimate unless the university "remains flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."¹⁶⁶ The context of a race conscious admissions program is paramount.¹⁶⁷

E. *Benefits of Diversity*

One of the fundamental issues before the Court in the *Grutter* case was whether the law school admission policy's use of *race classification* was justified by a compelling governmental interest. Justice O'Connor concluded that the Law School's justification for the use of race here is "the educational *benefits* that flow from a diverse student body."¹⁶⁸ What, then, are the *benefits* of the Law School's diversity admissions policy that the Court sees as substantial for overcoming the burden of the use of race?:

1. The "admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"¹⁶⁹
2. "[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"¹⁷⁰

163. *Johnson*, 480 U.S. at 634.

164. *Id.* at 641.

165. *Bakke*, 438 U.S. at 317-18.

166. *Grutter*, 539 U.S. at 337.

167. *Id.*

168. *Id.* at 343 (emphasis added).

169. *Id.* at 330 (quoting App. to Pet. for Cert. at 246a).

170. *Id.* (quoting App. to Pet. for Cert. at 246a, 244a).

3. "Diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society and better prepares them as professionals.'"¹⁷¹
4. "[S]kills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."¹⁷²
5. "[O]ppportunit[ies] through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity" if we are to maintain the very foundation of good citizenship.¹⁷³
6. "Effective participation by members of all racial and ethnic groups in the civic life our Nation is essential if the dream of one Nation, indivisible, is to be realized."¹⁷⁴
7. "[U]niversities, and in particular, law schools represent the training ground for a large number of our Nation's leaders," such as in Congress, and court rooms.¹⁷⁵
8. "[L]aw schools 'cannot be effective in isolation from the individuals and institutions with which the law interacts.'"¹⁷⁶

F. *Benefits of Diversity in the Military*

The military is an institution that has been attempting to make strides in diversifying the ranks of the officer corps. For example, in 2001, the active officer corps in the United Army was composed of officers graduating from the Reserve Officer Training Corps (ROTC), the U.S. Army Academy, Officers Candidate School (OCS) and direct appointment.¹⁷⁷ Demographics

171. *Id.* (quoting Brief for American Educational Research Association et al. as Amici Curiae 3); See also William Bowen & Derek Bok, *THE SHAPE OF THE RIVER* (Princeton Univ. Press 1998); *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (Gary Orfield & Michal Kurlaender eds., 2001).

172. *Grutter*, 539 U.S. at 330.

173. See *id.* at 331.

174. *Id.* at 332.

175. *Id.*; see also Karst, *supra* note 140, at 61 (noting that "no longer is the Court limiting its compelling-state-interest discussion to the educational experience in the classrooms and on the campuses. Now the Court has highlighted the nation's compelling interest in integrated leadership of our institutions.").

176. *Grutter*, 539 U.S. at 332 (quoting *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that the equal protection clause required that the applicant be admitted to the University of Texas Law School, since the school for African Americans (Texas Southern University) did not afford equal facilities)).

177. See OFFICE OF THE UNDER SECRETARY OF DEFENSE, PERSONNEL AND READINESS, POPULATION REPRESENTATION IN THE MILITARY SERVICES FISCAL YEAR 2001

of these institutions shows that Whites, who represent 75% of the United States Population graduate 76.4% from the ROTC Program, 85.45% from the Academy, 74.7% from OCS and 78.7% by Direct Commission appointment.¹⁷⁸ On the other hand, Blacks, who represent 12% of the United State population, graduated 13.6% from the ROTC Program, 5.6% from the Academy, 15.2% from OCS and 10.7% from Direct Commission. Hispanics, who represent 13% of the population, graduated 4.6% from ROTC, 3.3% from the Academy, 5.0% from OCS and 3.7% from Direct Commissions.¹⁷⁹ The total number of active white officers in the U.S. Army in 2001 was 50,543 (78.0%).¹⁸⁰ The total number of Black officers was 7,697 (11.8%), and the total number of Hispanics was 2,784 (4.2%).¹⁸¹

The United States Air Force officer corps is currently attempting to reach the same level of diversity as the Army. For example, in 2001, the active officer corps in the United Air Force was composed of officers graduating from the Air Force Reserve Officer Training Corp (AFROTC), the U.S. Air Force Academy, Officers Training School and others.¹⁸² Whites, who represent 75% of the United States population graduated 88% from the Air Force Academy, 88.3% from the AFROTC, and 88.6% from the Officers Training School.¹⁸³ On the other hand, Blacks graduated 5.0% from the Academy, 13.7% from ROTC and 5.2% from the Officer Training School.¹⁸⁴ Hispanics, who represent 13% of the United States population, graduated 2.9% officers from the Academy, 2.04% from the AFROTC, and 2.90% from Officers Training School.¹⁸⁵

It is obvious that these two national institutions that train individuals for leadership in the military service and for leader-

app. B (Tbl. B-43) (Mar. 2003), *available at* http://www.dod.mil/prhome/poprep2001/appendixb/b_43.htm (last visited Aug. 25, 2004).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. OFFICE OF THE UNDER SECRETARY OF DEFENSE, PERSONNEL AND READINESS, POPULATION REPRESENTATION IN THE MILITARY SERVICES FISCAL YEAR 2001 app. B (Tbl. B-43) (Mar. 2003), *available at* http://www.dod.mil/prhome/poprep2001/appendixb/b_43.htm (last visited Aug. 25, 2004).

183. *Id.*

184. *Id.*

185. *Id.*

ship in the civilian world would benefit immensely from diversity programs to achieve their goals.¹⁸⁶ The United States military states that '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.'¹⁸⁷ O'Connor continues:

The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising [of] students already admitted to participating colleges and universities. At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admission policies." (*emphasis in original*). To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, and it *must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.*" [*emphasis added*]. We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."¹⁸⁸

G. *Achieving Diversity Through Critical Mass*

The Plaintiff argues that she "was rejected because the Law School uses race as a 'predominant' factor, giving applications belonging to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups."¹⁸⁹ Additionally, Dr. Kinley Larntz presents evidence that race should not be the predominant factor in the Law School's admission process that students from different groups have equal chance of admission when

186. See Karst, *supra* note 140, at 66 (analyzing the amicus submitted by the military sketching the painful history of racial integration in the services, notably including the racial tensions that led to incidents of violence in the ranks during the Vietnam war, materially interfering with the Army's mission).

187. *Grutter*, 539 U.S. at 331 (quoting Brief for Julius W. Becton, Jr. Amici Curiae at 27, (U.S. Feb. 21, 2003), *reprinted at* 2003 WL 1787554 (stating that "because racial diversity in higher education also is necessary to integrate the officer corps and to train and educate white and minority officers, it is essential to ensuring an effective, battle-ready fighting force.")).

188. *Grutter*, 539 U.S. at 331 (internal quotations omitted).

189. *Id.* at 317.

they are equally qualified.¹⁹⁰ But commentators argue that Larntz's framework disfavors minority groups, with greater disfavor for minorities with a small population.¹⁹¹ The Law School's admission policy is to admit both minorities and non-minorities through a "critical mass"¹⁹² diversity program, which the court adopts in its opinion.¹⁹³ "[C]ritical mass means 'meaningful numbers' or 'meaningful representation,'" which is further defined as "'a number that encourages under-represented minority students to participate in the classroom and not feel isolated.'"¹⁹⁴ It is defined by reference to the *educational benefits* that diversity is designed to produce.¹⁹⁵ There is no number, percentage, range of numbers, or range of percentages that constitute "critical mass."¹⁹⁶ The concept is not quantified.¹⁹⁷ "Some attention to numbers, without more, does not transform a flexible admissions system into a rigid quota."¹⁹⁸ "Critical mass," said the court, therefore, is not a quota.¹⁹⁹ The purpose of "critical mass" is to ensure that underrepresented minority students are included so as to realize the educational benefits of a diverse student body.²⁰⁰ The Court argues that when minority students "are present, racial stereotypes lose their force because non-minority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."²⁰¹ "By enrolling a 'critical mass' of

190. *Id.* at 320.

191. See generally David M. White, *The Requirement of Race-Conscious Evaluation of LSAT Score for Equitable Law School Admissions*, 12 BERKELEY LA RAZA L.J. 359, 418 (2001) (discussing Dr. Larntz's opinion that the University of Michigan Law School is preferring less qualified minority applicants over better qualified white applicants).

192. See BETTY FREIDAN, *THE FEMININE MYSTIQUE* 21 (1963). One of the first references to "critical mass" was in Betty Freidan's book where she states, "for women may have to reach a point of *critical mass* in any institution to raise that different voice, and the institution may have to face its own critical crisis to hear it." *Id.*

193. *Grutter*, 539 U.S. at 312-16; see also Lauriat, *supra* note 133, at 1173-74 (outlining the history of "Diversity" in Education Admissions Policies).

194. *Id.* at 318 (quoting App. to Pet. for Cert. at 208a-209a).

195. *Id.* at 319.

196. *Id.* at 318.

197. *Id.*

198. *Grutter*, 539 U.S. at 336 (citing *Bakke*, 438 U.S. at 323).

199. *Id.* at 335.

200. *Id.* at 316.

201. *Id.* at 319-20 (quoting App. to Pet. for Cert. at 215a).

underrepresented minority students, the Law School seeks to 'ensur[e] their ability to make unique contributions to the character of the Law School.'"²⁰² Giving deference to the Law School with respect to its admission policies, the Court states that the "[s]chool has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."²⁰³

H. *Narrowly Tailoring Compelling Interest*

Although the Court determined that critical mass is necessary, as mentioned above, strict scrutiny must be applied when imposing racial classifications.²⁰⁴ Strict scrutiny²⁰⁵ requires that the compelling governmental interest be narrowly tailored to pass constitutional muster.²⁰⁶ "[Grutter] and the United States argue that the Law School's plan is not narrowly tailored²⁰⁷ because race-neutral means exist to obtain the educational benefits of student body diversity the Law School

202. *Id.* at 316 (quoting App. at 120-21).

203. *Grutter*, 539 U.S. at 333.

204. *Id.* at 327; see also *Adarand Constructors.*, 515 U.S. at 227 (where the court first announced that federal affirmative action programs would be subject to "strict scrutiny").

205. See Libby Huskey, *Constitutional Law—Affirmative Action in Higher Education—Strict in Theory, Intermediate in Fact? Grutter v. Bollinger*, 4 Wyo. L. REV. 439, 441-42 (2004) (arguing (1) that the Grutter court conceived and applied a more deferential form of strict scrutiny than had been used in prior affirmative-action cases, (2) altering the strict scrutiny analysis in this manner served to confuse the decision and undermine the well-established strict scrutiny test, and (3) instead of weakening the strict scrutiny test, the court should have broken from precedent and explicitly upheld the law school's program under intermediate scrutiny).

206. See *Johnson v. Bd. of Regents*, 263 F. 3d 1234 (11th Cir. 2001) (the first federal court of appeals to evaluate a university's affirmative action policy on narrow tailoring grounds); Recent Case, *Circuit Holds that University's Race-Conscious Admissions Policy is Unconstitutional—Johnson v. Board of Regents of the University of Georgia*, 115 HARV. L. REV. 1239 (2002) (analyzing the concept of "narrow tailoring").

207. See generally Ian Ayres, Symposium on Affirmative Action: *Narrow Tailoring*, 43 UCLA L. Rev. 1781 (1996) (arguing that the courts preference for "race-neutral means to increase minority participation" is inconsistent with narrow tailoring and may not be a less restrictive alternative than explicit racial classifications).

seeks.”²⁰⁸ Their argument is based on footnote 6 in the *Wygant* decision.²⁰⁹ But the court refutes this argument and states that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” yet it does require “good faith consideration of workable race-neutral alternatives [to] achieve the diversity the university seeks”.²¹⁰ The court concluded “that the Law School sufficiently considered workable race-neutral alternatives . . . without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.”²¹¹

1. Individualized Consideration

Then, if strict scrutiny²¹² requires that the compelling governmental interest²¹³ be narrowly tailored to pass constitutional muster, “narrow tailoring”²¹⁴ requires that “in the context of its

208. *Grutter*, 539 U.S. at 339; see generally Kevin Joyner, *The Use of Race in the Admissions Programs of Higher Educational Institutions-A Violation of the Equal Protection Clause*, 19 CAMPBELL L. REV. 489 (1997).

209. 476 U.S. at 280 n.6. “The term ‘narrowly tailored,’ so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternatives and less restrictive means could have been used.” *Id.* See also John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 n.26 (1974) (noting that the classification at issue must “fit” with greater precision than any alternative means); Kent Greenawalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578-79 (1975) (“stating that [courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense”).

210. *Grutter*, 539 U.S. at 339-40 (emphasis added) (stating that the Law School did not have to consider “using a lottery system” or “decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores” as race neutral alternative or a “percentage plan”); see also *Wygant*, 476 U.S. at 280 n.6 (stating that narrow tailoring requires “lawful alternatives and less restrictive means”).

211. *Grutter*, 539 U.S. at 340.

212. See generally Jaideep Venkatesan, *Fatal In Fact?: Federal Courts’ Application of Strict Scrutiny to Racial Preferences in Public Education*, 6 TEX. F. ON C.L. & C.R. 173 (2001) (arguing that courts have applied a “contextual strict scrutiny”, rather than different strict scrutiny frameworks for different government classifications, dependent upon whether government is acting as a contractor, subsidizer, employer, or educator).

213. *Id.* at 175 (discussing two characteristics of compelling interest: (1) the kinds of interests that are acceptable and (2) the evidence required to show that an acceptable compelling justification in fact exist).

214. See generally Ayres, *supra* note 195 (discussing the case history of narrow tailoring).

individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program may not unduly [favor racial and ethnic groups, and at the same time,] harm non-minority applicants."²¹⁵ Therefore, as long as the Law School utilizes race in a race conscious admissions program as a "plus factor," and not as its sole criteria, in the context of *individualized consideration*,²¹⁶ a rejected applicant

will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname . . . His qualification would have been weighted fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.²¹⁷

The importance of *individualized consideration* in the context of a race-conscious admissions program is paramount.²¹⁸

2. Law School's Individualized Holistic Considerations

Justice O'Connor held that the University of Michigan properly utilized a highly *individualized, holistic review* of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.²¹⁹ The criteria and considerations that the court requires to pass muster for race-conscious admission programs are that: (1) there be no automatic acceptance or rejection based on any

215. *Grutter*, 539 U.S. at 341. See also Lawrence, *supra* note 54 (discussing Race-Conscious Admissions Programs); *Metro Broad.*, 497 U.S. at 630 (1990) (O'Connor, J., dissenting) (promoting minority ownership by the FCC of broadcast stations through its "distress sale" policy, which awarded an enhancement credit for ownership and participation by members of minority groups. It held that the policy did not violate equal protection component of the Fifth Amendment because the policy did not "impose impermissible burdens on non-minorities.").

216. See Robert A. Sedler, *Affirmative Action, Race, and the Constitution: From Bakke to Grutter*, 92 Ky. L.J. 219, 237 (2003-2004) (discussing "individualized consideration" and comparing it with University of Michigan undergraduate admissions program that mechanically assigned a number of points for different factors including 5 points for male nurses, 20 points for athletes, 20 points for provost's discretion and 20 points for minorities).

217. *Bakke*, 438 U.S. at 318.

218. *Grutter*, 539 U.S. at 341. See also *Bakke*, 438 U.S. at 318 (stating that the denial of the right to "individualize consideration" was the "principal evil" of the medical school's admissions program).

219. *Grutter*, 539 U.S. at 337.

single “soft” variable,²²⁰ (2) there be no mechanical predetermined diversity “bonuses” based on race or ethnicity,²²¹ (3) the admission policy is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each individual applicant,²²² (4) all pertinent elements be placed on the same footing for consideration, (5) but “not necessarily according them the same weight,”²²³ (6) the policy adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in the admission decision,²²⁴ (7) all admitted students, minority [and non-minority] be deemed qualified,²²⁵ and (8) the law school considers the student’s experiences of particular importance to the law school.²²⁶

Examples of a student experience of particular importance to the law school include “applicants who lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have an exceptional record of extensive community service, and have had successful careers in other fields.”²²⁷ In addition, other considerations for admissions may include the “applicant’s promise of making a notable contribution to the class by a particular strength, attainment or characteristic [such as] unusual intellectual achievement, employment experience, nonacademic performance, or personal background.”²²⁸ But race is still an important factor in a race-conscious admissions program because “‘when the committee on admission reviews the large middle group of applicants who are ‘admissible’ and deemed capable of doing

220. *Id.*

221. *Id.* See also *Gratz v. Bollinger*, 538 U.S. 904 (2003) (finding that the undergraduate school had allocated bonus points by (1) Geography (2) Alumni (3) Essay (4) Personal Achievement (5) Leadership and Service and (6) Miscellaneous).

222. *Grutter*, 539 U.S. at 337. For example, the Law School gives substantial weight to diversity factors besides race when it frequently accepts non-minority applicants with grades and test scores lower than underrepresented minority applicants and other non-minority applicants. *Id.*

223. *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317).

224. *Id.* at 338.

225. *Id.* at 337.

226. *Id.* at 338.

227. *Id.*

228. *Grutter*, 538 U.S. at 338.

good work in their courses, the race of an applicant may tip the balance in her favor.”²²⁹

Therefore, the court concluded that “in the context of its *individualized*, [*holistic*] inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program d[id] not unduly harm nonminority applicants.”²³⁰

IV. The Sun Sets on Racial Preference in 2028

Finally, Justice O’Connor avers that, “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”²³¹ There are several interesting questions that spring from this commentary. First, does this mean that the issue of racial preferences in education is constitutional today, but will become unconstitutional in 25 years? Or does it mean that the court’s position is unconstitutional now, but that it will waive the unconstitutional infraction for the next 25 years? Moreover, is there an implication in the commentary that within 25 years the issues related to race relative to education will be eradicated and judicial protection of minorities in education will become unnecessary? Finally, if the issue of racial preference arises in the year 2029 it is unlikely that the Supreme Court will have the same judicial composition. Whether or not racial preferences will need to be taken into account to attain the aforementioned educational and social benefits by 2028 remains to be seen. But considering race in the context of United States economic, social, political and legal history, twenty-five years seems more like a distant hope than an achievable reality.

V. Conclusion

The *Grutter* case has brought us full circle from President Kennedy’s vision to “take affirmative action to ensure” practices are free of racial bias,²³² and President Johnson’s pledge to seek “not just equality as a right and theory, but equality as a fact

229. *Id.* at 339 (quoting *Bakke*, 438 U.S. at 316).

230. *Grutter*, 539 U.S. at 341 (emphasis added).

231. *Id.* at 343.

232. See Kennedy, *supra* note 2.

and equality as a result"²³³ to Justice O'Connor's conclusion that by 2028 judicial attention to the issue of race, affirmative action and preference will no longer be necessary.

Justice Powell's opinion in *Bakke* seems to be the pivotal point from which legal theory and the idea of race-conscious programs are anchored. Slowly, over time, the affirmative action equal protection legal framework began to morph into the concept of "diversity" and the question became whether a state's educational institutions have a compelling governmental interest to use race to diversify their campuses. At least for the next twenty-five years, it is settled that diversity may only be achieved through "critical mass," that racial classification will be subjected to strict scrutiny, and that the state compelling interest must be narrowly tailored. *Grutter* teaches us that a state interest is narrowly tailored when the university uses race as a *plus factor*, and student applications are viewed and given *individualized consideration*, not point allocation. In didactic fashion, *Grutter* outlines, with great specificity, the criteria for *individualized consideration* to pass constitutional muster for race-conscious admission program.

The social progression of race relations in America has been reflected in the history of affirmative action through congressional legislation and American jurisprudence. The history of affirmative action teaches us that we started with a great dream – "[w]e seek not just freedom but opportunity . . . not just legal equity but human ability, *not just equality as a right and theory, but equality as a fact and as a result.*"²³⁴ Slowly, the Supreme Court is working itself through the jurisprudential web of rights and theory.

233. See Johnson, *supra* note 4.

234. *Id.* (emphasis added).